

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1322

Cir. Ct. No. 2010CV197

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DAVID A. SMITH AND CYNTHIA SMITH,

PLAINTIFFS-RESPONDENTS,

V.

FRANK A. DONALDSON, III AND DEBORAH S. DONALDSON,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Sawyer County:
GERALD L. WRIGHT, Judge. *Reversed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve
Judge.

¶1 PER CURIAM. Frank Donaldson and Deborah Donaldson (collectively, Donaldson) appeal a judgment establishing the southern boundary line of their property at two iron posts, located approximately sixty feet north of

the government lot line. Donaldson argues that, because the court found the actual location of the government lot line, his deed was rendered unambiguous and the southern boundary of his property extends to the government lot line. He contends the court erred by relying on evidence of common usage and acquiescence instead of his deed when determining his property boundary. Donaldson also asserts that, in any event, there was insufficient evidence of common usage and acquiescence because the land in dispute was undeveloped and unused.

¶2 We conclude the circuit court's determination of the government lot line rendered the parties' deeds unambiguous and, by deed, the property boundary is the government lot line. We also conclude that the circuit court erred by concluding David Smith and Cynthia Smith (collectively, Smith) had gained title to the disputed parcel based on evidence of common usage and acquiescence. We therefore reverse the circuit court's judgment.

BACKGROUND

¶3 Donaldson owns a parcel of land in Government Lot 3 that is adjacent to and north of a parcel of land in Government Lot 4 owned by Smith. The southern boundary of Government Lot 3 is the same as the northern boundary of Government Lot 4, except that the western boundary of Government Lot 4 extends an additional one-fourth mile beyond that of Government Lot 3. As a result, the northern boundary of Government Lot 4 also shares the southern

boundary of the quarter-quarter section immediately west of Government Lot 3. To the east of Government Lots 3 and 4 lies Grindstone Lake.¹

¶4 The lots were originally surveyed in 1856, and, in 1926, surveyor Otto Gobler found and restored various corners in Section 23, which contains both government lots. In June 1958, surveyor Edward Gobler surveyed Government Lot 3, divided it into parcels, and presumably placed the two iron pipes depicted in his survey along the southern boundary of Government Lot 3. In July 1959, Donaldson's predecessors in title purchased the southern parcel of Government Lot 3 from Scipio and Bernice Wise, and their warranty deed described the southern boundary of the parcel as occurring at the government lot line. The deed made no reference to E. Gobler's 1958 survey or any iron pipes.

¶5 In May 1967, Smith's predecessors in title purchased the northern parcel of Government Lot 4 from James and Joan Hunt, and their warranty deed described the northern boundary of the parcel as occurring at the government lot line. In June 1967, Fred Aliesch completed a survey of the northern parcel of Government Lot 4. His survey incorporated what appeared to be E. Gobler's iron pipes, and it marked the northern boundary of Government Lot 4 at the iron pipes. However, when Aliesch described the parcel, he used the same description as used in Smith's predecessors' warranty deed, and thus made no reference to the pipes or E. Gobler's survey and placed the northern boundary at the government lot line.

¹ For visual purposes, we have attached trial exhibit 1, which depicts Government Lots 3 and 4 in the original 1856 survey. During trial, Sawyer County surveyor Daniel Pleoger circled the disputed area in this case.

¶6 Smith purchased the northern parcel of Government Lot 4 in 1988 by warranty deed.² Similar to his predecessors in title, the description of the parcel in Smith's deed established the northern boundary at the government lot line and made no reference to Aliesch's survey or the iron pipes. However, Smith testified that when he purchased the property he believed the two iron pipes marked the northern boundary of Government Lot 4.

¶7 In 2001, Donaldson purchased the southern parcel of Government Lot 3 by warranty deed. Unlike the deed of his immediate predecessors in title, Donaldson's deed described the southern parcel of Government Lot 3 by reference to a certified survey map. The certified survey map had been completed six months earlier, and it marked the southern boundary of Government Lot 3 as coinciding with E. Gobler's iron pipes.³

¶8 Smith later purchased the parcel of property located in the quarter-quarter section immediately north of Government Lot 4 and west of Government Lot 3. Upon his purchase, he realized there was an issue regarding the northern boundary of Government Lot 4—specifically, the northern boundary of Government Lot 4 was supposed to be the same as the southern boundary of his new parcel; however, the quarter-quarter section's certified survey map placed the southern boundary of the new parcel approximately sixty feet south of what Smith believed was the north boundary of Government Lot 4.

² Smith asserts he purchased the parcel in 1978. The circuit court determined Smith purchased the parcel in 1988. The year of purchase has no bearing on our determination.

³ After the lawsuit commenced, Donaldson's predecessors in title conveyed to Donaldson the parcel in Government Lot 3 as described in their deed, which established the southern boundary of Government Lot 3 as occurring at the government lot line.

¶9 Smith hired surveyor Jesse Suzan. Suzan surveyed the properties and opined the problem was E. Gobler’s iron pipes—specifically Gobler had placed the iron pipes approximately sixty feet north of the true boundary line between Government Lots 3 and 4. Smith subsequently sued Donaldson, seeking a declaration that the boundary line between Smith’s and Donaldson’s parcels occurred at the iron pipes and Smith owned the land south of the pipes.

¶10 Following a one-day trial, the circuit court first found the original monuments for the northern boundary line of Government Lot 4 had been lost, but they were reset by surveyor Fred Zeitlow in 2004 in reliance on Otto Gobler’s 1926 survey. It concluded that the true boundary line between Governments Lots 3 and 4 was sixty feet south of E. Gobler’s iron pipes.

¶11 However, relying on *Northrup v. Opperman*, 2011 WI 5, 331 Wis. 2d 287, 795 N.W.2d 719, the circuit court reasoned that, although it had determined the actual location of the boundary line between Government Lots 3 and 4, it could not determine the parties’ property lines because it was “not possible to determine the boundary line solely from the deeds and the original monuments.” Following *Northrup*, the court reasoned that it needed to look “to evidence of common usage and acquiescence” to determine whether the boundary between the parties’ property was located at the government lot line as reestablished or at Gobler’s pipes.

¶12 The court placed the property boundary at Gobler’s pipes. It reasoned that, although the land between the government lot line and Gobler’s pipes was wooded, undeveloped, and unused, title to that property should go to Smith because: post-1958 surveys relied on and incorporated the iron pipes; the parties believed that the pipes marked the boundary line when they purchased their

respective parcels; and “every transaction concerning property in Government Lot 3 was based upon the 1958 E. Gobler survey, and people have been using the pipes he set as landmarks.” The court therefore conveyed the land south of the iron pipes to Smith.

DISCUSSION

¶13 Donaldson argues the circuit court erred by applying *Northrup* to this case. He asserts the circuit court’s determination of the actual lot line between Government Lots 3 and 4 rendered the parties’ deeds unambiguous and therefore the circuit court did not need to resort to extrinsic evidence to determine the property boundary. He also argues that, although the *Northrup* court used “evidence of common usage and acquiescence” to establish the property boundary in that case, the evidence of common usage and acquiescence in this case was insufficient to establish the property boundary at the iron pipes.

¶14 *Northrup* involved a property boundary dispute between landowners who owned adjacent parcels located in Sections 8 and 9, respectively. *Northrup*, 331 Wis. 2d 287, ¶2. After a trial, the circuit court made various findings about its inability to make a determination on the location of the actual boundary line between the sections. *Id.*, ¶19. The court then reasoned that, “although the descriptions in the deeds are unambiguous on their face, the real estate cannot be located on the ground” because “the corner of Sections 4,[] 5, 8, and 9 cannot be located.” *Id.*, ¶22. As a result, the circuit court looked to extrinsic evidence to determine the boundary line. *Id.*, ¶23. It reasoned the best available evidence of the boundary line was “the lines of occupation and possession.” *Id.* It concluded the boundary line between the parcels was a road because the parties and their

predecessors in title had used and possessed the property for almost a century as though the road marked the boundary line. *Id.*

¶15 Our supreme court concluded the circuit court properly relied on “evidence of common usage and acquiescence of ownership and possession” to establish the boundary line at the road. *Id.*, ¶¶1, 56. It stated that, if a circuit court concludes the actual boundary line cannot be determined “from the deed and original monuments or markers[,] ... the circuit court looks to the best evidence of the boundary line.” *Id.*, ¶42. The *Northrup* court concluded that after the circuit court made its findings that the original section corner no longer existed, no competent evidence was presented showing where the original section corner was placed, no clear and convincing evidence showed that the restored 1912 corner was correct, and no clear and convincing evidence existed showing the location of the actual section line, the circuit court properly focused on the best available evidence to establish the boundary line. *Id.*, ¶¶50, 52.

¶16 The *Northrup* court concluded the best evidence of the boundary line was, as the circuit court found, “the long occupation of the properties by the parties to the present case, their neighbors and their predecessors in title.” *Id.*, ¶52. Specifically, the court noted the road had been honored as the boundary line for more than a century and there was “long-time undisturbed possession of property based upon the [road] as the boundary line.” *Id.*, ¶¶52-54.

¶17 Although the circuit court in this case relied on *Northrup* when making its boundary determination, *Northrup* differs from the present situation in two significant ways. First, in *Northrup*, the court observed that there was no clear and convincing evidence showing the actual location of the section line. *Id.*, ¶23. Conversely, the circuit court in this case found the actual location of the lot

line between Government Lots 3 and 4. On appeal, neither party disputes the court's determination of the government lot line's location.

¶18 Second, in *Northrup*, the court reasoned that, although the parties' deeds were unambiguous on their face, it could not determine the location of the parties' real estate because the court did not know the location of the section line. *Id.*, ¶22. However, in this case, the court's determination of the location of the government lot line allowed the court to locate the real estate on the ground. The parties' deeds unambiguously provide that Smith owns the land south of the government lot line and Donaldson owns the land north of the line. The established location of the government lot line placed the disputed parcel of land in Government Lot 3, which means that by deed Donaldson—not Smith—owns the disputed parcel.

¶19 Smith, however, intimates that we must ignore the court's determination of the government lot line because *Northrup* states that a circuit court should look to extrinsic evidence if the true boundary line cannot be determined "from the deed and original markers." *Id.*, ¶42. He asserts that, because no original markers exist to establish the line, and because the parties' deeds cannot be located on the ground without knowledge of the government lot line, the circuit court needed to rely on extrinsic evidence. Smith's argument places form over substance. In *Northrup*, the court never knew the location of the government section line and therefore relied on extrinsic evidence. *See id.*, ¶19. However, here, the circuit court found the location of the government lot line, which both Donaldson and Smith agree is correct. Because the parties' property

interests can be determined from their deeds and the established government lot line, the circuit court did not need to resort to extrinsic evidence.⁴

¶20 We recognize that a boundary line may be different from that described in a deed under certain legal theories such as “adverse possession, prescription, agreement, practical location, acquiescence or estoppel.” *Northrup*, 331 Wis. 2d 287, ¶27 n.10 (quoting 6 John S. Grimes, *Thompson on Real Property* § 3034, at 506 (1962)). Here, the court determined the boundary line between Smith’s and Donaldson’s property should be drawn at the iron pipes based on “evidence of common usage and acquiescence.” “Acquiescence” when used in an evidentiary sense, as opposed to its use in the legal doctrine of acquiescence, means that the boundary may be established by evidence of the “conduct of the neighbors.”⁵ *Id.*, ¶32.

¶21 The court placed the boundary line at the iron pipes instead of the government lot line as referenced in the parties’ deeds because: post-1958 surveys had relied on and incorporated Gobler’s iron pipes; both Smith and Donaldson originally believed the property boundary was at the iron pipes; and, “Since 1958, every transaction concerning property in Government Lot 3 was based upon the 1958 E. Gobler survey, and people have been using the pipes he set as landmarks.”

⁴ It appears that the circuit court implicitly recognized that Donaldson owned the disputed parcel by deed. After all, the court’s judgment conveyed land to Smith that is located in Government Lot 3.

⁵ Neither party argues that the circuit court relied on the legal doctrine of acquiescence instead of evidence of common usage and acquiescence. Indeed, when applying *Northrup*, the court stated it needed to look to “evidence of common usage and acquiescence rather than the legal doctrine of acquiescence.”

¶22 We conclude the circuit court’s findings do not amount to sufficient evidence of “common usage and acquiescence” to establish the property line at the iron pipes instead of the government lot line. First, E. Gobler’s 1958 survey and any post-1958 surveys that relied on the pipes do not support drawing the boundary at the iron pipes simply because neither party holds title to their respective parcels based on Gobler’s pipes or any survey that incorporated or relied on the pipes.

¶23 Second, although both parties originally believed the property boundary was at Gobler’s pipes, this belief cannot by itself serve as “evidence of common usage and acquiescence.” *See, e.g., Northrup*, 331 Wis. 2d 287, ¶¶52-54 (developed road and century-long possession and occupation of land based on the road constituted evidence of common usage and acquiescence). Here, the circuit court found that the iron pipes were located in a wooded area and the disputed parcel of land was undeveloped, unused, and “lying fallow.” Although Smith points out that the two iron pipes were at some point each marked by an iron post and were therefore visible, this does not support the court’s determination that Smith commonly used, possessed, or occupied the disputed parcel such that the boundary line should be drawn at the iron pipes. Simply put, the evidence does not support a determination of common usage or acquiescence based on the parties’ conduct.

¶24 Moreover, we observe that no other legal theory has been presented that would give Smith title to the disputed parcel in Government Lot 3. Donaldson argues that Smith cannot assert a claim under either adverse possession or the legal doctrine of acquiescence because both theories require open and visible use of the property, which is not present here. *See, e.g., Peter H. & Barbara J. Steuck Living Trust v. Easley*, 2010 WI App 74, ¶¶14, 39, 325

Wis. 2d 455, 785 N.W.2d 631. Smith does not refute these assertions and therefore they are deemed conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). In any event, the record is clear that the disputed parcel was unused and undeveloped.

¶25 Because the evidence of common usage and acquiescence was insufficient to draw the boundary line at the iron pipes instead of the government lot line as referenced in the parties' deeds, and because no other legal theory has been presented that would give Smith title to the disputed parcel in Government Lot 3, we reverse the circuit court's judgment conveying the disputed parcel to Smith.

By the Court.—Judgment reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

Trial Exhibit 1



